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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 457

CHARLES WALKER CORDOVA AND COLUMBIA PAINTING COMPANY (a corporation),
Petitioners,

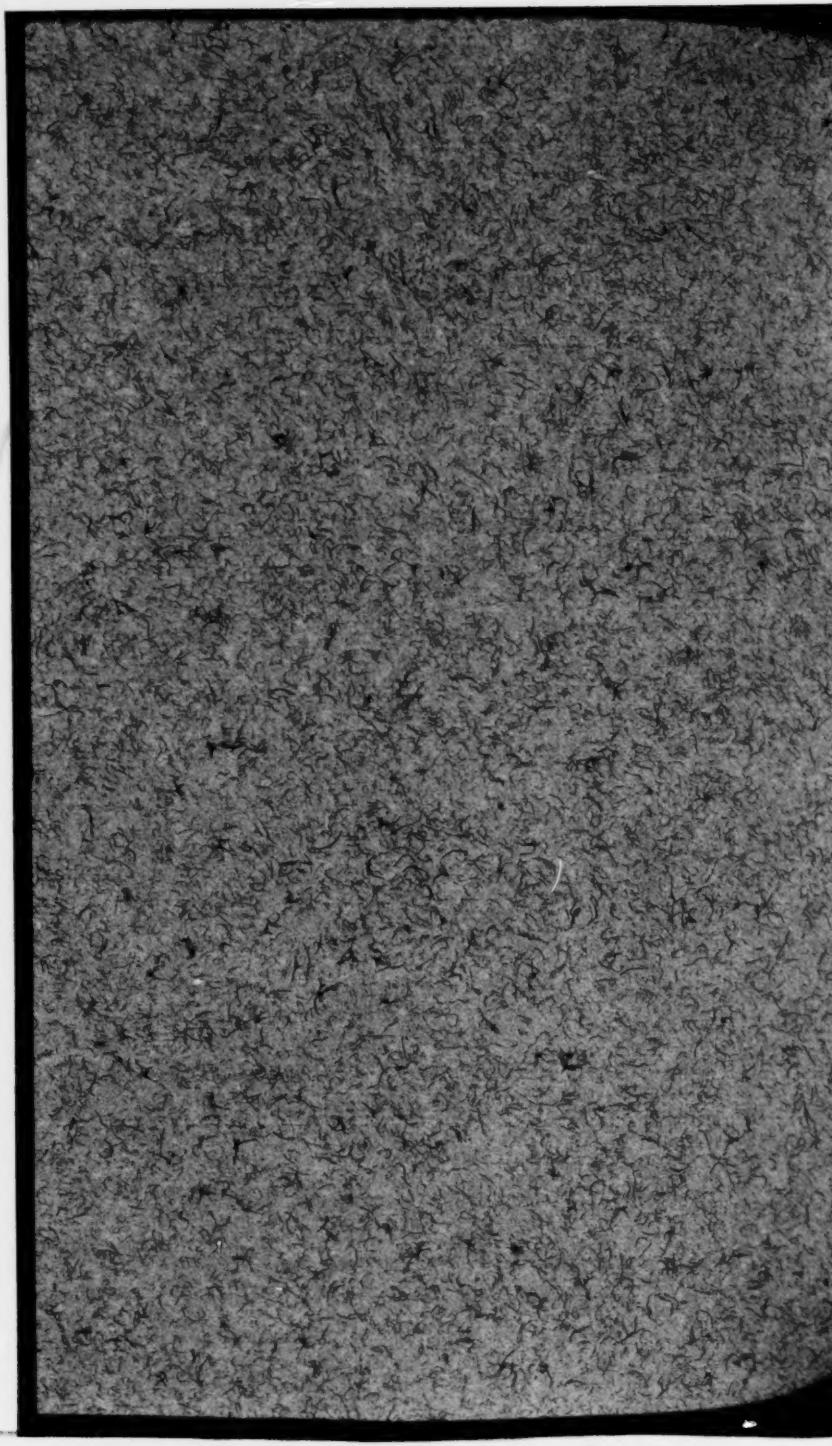
v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT.

THURMAN ARNOLD,
ARNOLD, FORTAS & PORTER,
1200 - 16th Street, N.W.,
Washington, D. C.

WALTER M. GLEASON,
Merchants Exchange Building,
San Francisco, California,
Attorneys for Petitioners.



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IN THE

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OCTOBER TERM, 1949.

No.

CHESTER WALKER COLGROVE and COLUSA REMEDY COMPANY (a corporation),
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To The Honorable, The Chief Justice of The United States, and to The Associate Justices of The Supreme Court of The United States:

Chester W. Colgrove and Colusa Remedy Company, a corporation, (hereinafter styled Petitioners) respectfully petition that a writ of certiorari be issued to review the judgment of the U. S. Court of Appeals for the Ninth Circuit; which affirmed a judgment of the U. S. District Court

for the Southern District of California (Central Division) adjudging petitioners guilty of criminal contempt, for having allegedly disobeyed an injunction issued by that court in a civil proceeding under the Federal Food, Drug & Cosmetic Act.

The opinion of the Court of Appeals appears in the record (R. 88) and is officially reported (176 F. 2d 614). The judgment of the District Court also appears in the record. (R. 34, 36)

JURISDICTION.

This contempt proceeding was instituted by the filing of a criminal information in the District Court, charging a criminal contempt allegedly in violation of the federal criminal contempt statute. (28 U. S. C. Sec. 386)[1] The judgment of the Court of Appeals affirming the judgment of the District Court was entered on August 8, 1949. (R. 96) Thereafter, on September 6, 1949, and within the time allowed therefor, a Petition for Rehearing was filed, which was denied on September 19, 1949. (R. 97) On October 17, 1949, the Chief Justice granted an extension of time for filing this petition to November 18, 1949. Jurisdiction of this Honorable Court is invoked under 28 U. S. C. § 1254, Subdivision 1.

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[1] This statute, as it existed at the time of the alleged contempt herein, read in part:

> "Sec. 386. Contempts: When constituting also criminal offense. Any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed shall be proceeded against for his said contempt as provided in Sections 387-390 of this title. (Oct. 15, 1914, c. 323, Sec. 21, 38 Stat. 738.)"

THE FACTS.

Petitioners are a corporation and its president. They were convicted of criminal contempt and subjected to severe and degrading punishment (fines of $9,000.00; jail sentence of two years suspended on five years probation) in disregard of the presumption of innocence and without consideration of the principle of reasonable doubt and without any pleading or proof of willfulness. The court conceded that petitioners had followed the literal meaning of the injunction but insisted that they had violated its spirit. The court then ruled that the mere violation of the injunction as thus construed was all the proof necessary to justify a sentence of criminal intent and that evidence of willfulness was unnecessary. The circumstances were as follows:

Petitioners were selling in interstate commerce a petroleum oil for skin diseases known as Colusa Natural Oil. On the 24th of February, 1947, the United States District Court for the Southern District of California issued a preliminary injunction requiring that the labels on petitioners' product contain "*specific* directions for the use of such product in the treatment of all conditions, ills and diseases for which such product is prescribed, recommended, and suggested, in the advertising material disseminated or sponsored by or on behalf of" petitioners. (R. 2, 3)

On April 14, 1947, with the written consent of petitioners the District Court granted a permanent injunction. The significant language of the permanent injunction is identical with that of the preliminary injunction except that the word "adequate" is substituted for the word "specific". (R. 3)

The language of the permanent injunction forbids the shipment of petitioners' product in interstate commerce

> "* * * without a label containing *adequate* directions for the use of such product in the treatment of all conditions, ills and diseases for which such product is prescribed, recommended, and suggested, in the advertis-

ing material disseminated or sponsored by or on behalf of the defendants or either of them; . . ." (R. 3)

Petitioners in good faith attempted to comply with each of these injunctions. They changed the label to read as follows:

"A natural unrefined petroleum oil intended for use in the treatment of Psoriasis, Eczema, Athlete's Foot, and Leg Ulcers.

"Directions: Apply to affected parts and rub it in thoroughly morning and night. For open sores, saturate cotton pad with oil and bind on by gauze. Change to fresh dressing morning and night. For tender skin oil can be diluted 50% with olive oil. Continue treatment until skin is smooth and comfortable . . . " (R. 4)[2]

In its advertising after changing the label as above described, the petitioners in large print prescribed their product for the four diseases mentioned in the amended label. In fine print in the testimonials at the bottom of the advertisement there were suggestions that the drug was efficacious not only for the four skin diseases mentioned in the label but also for "poison ivy, poison oak, bed sores, acne, ringworm, scaley red face, burns, piles, and itch."

As the record shows without any contradictory testimony whatever, petitioners believed that the label as changed conformed to the decree. (R. 59-65) It contained directions for the use of the product which petitioners believed "adequate". The directions were to apply to the parts affected. Those directions were equally adequate for the diseases listed in large print on the advertisement and for the diseases in small print. It would not occur to anyone

---

[2] The label in the form in which it was used before the injunction was issued (R. 23, 50) was as follows:

"A Natural Unrefined Petroleum Oil"

"Directions: Apply to affected parts and rub it in thoroughly morning and night. For open sores saturate cotton pad with oil and bind on by gauze. Change to fresh dressing morning and night. For tender skin oil can be diluted 50% with olive oil."

of common sense to do anything else with the oil for the diseases mentioned in fine print than to rub them on the affected parts.

Nevertheless, on October 2, 1947, a criminal information was filed against petitioners charging criminal contempt of the injunction. The information was in nine counts. (R. 2-15) The counts related to different shipments of the product in interstate commerce but were all based on the same contention. The information charges (R. 4):

> "Said advertisements prescribe, recommend, and suggest Colusa Natural Oil as highly efficacious not only for psoriasis, athlete's foot, eczema, and leg ulcers (the four disease conditions mentioned on the label of said drug) *but also* for poison ivy, poison oak, bed sores, acne, ringworm, scaley red face, burns, piles, and itch." [Emphasis in original]

It continues that the labels on petitioners' product, as shipped:

> ". . . disregarded the requirements of the aforesaid preliminary injunction since they fail even to attempt to *bear specific directions for use of the product in the treatment of all ills, conditions, and diseases for which the product is prescribed, recommended and suggested in the advertising* material disseminated and sponsored by the defendants.
>
> "That by reason of the said shipment . . . the defendants are in criminal contempt of the preliminary injunction issued by this Court as aforesaid." (R. 5)

This is the entire extent of the allegation of the information. *No charge was made anywhere in the information that the alleged contempt was willful,* although the statute under which the information was brought, 28 U. S. C. § 386, applies only to "Any person who shall wilfully disobey . . ." a lawful court order.

A trial was had before a judge without a jury. The Government's entire case consisted of a stipulation that the

shipments in interstate commerce had been made and that the labels and the newspaper advertising were in the forms attached. The Government then rested (R. 27, 46-49, 56). The only other testimony in the case was that of petitioner Colgrove (R. 56-65) who testified that he understood the injunction as requiring that the labelling include only the names of the four diseases featured in large type in his advertisement and that he went to great expense and trouble to alter his labels to meet the injunction as he in good faith understood it. (R. 63) He also testified that the conditions mentioned in small type in the advertisement were merely alternative names for or special cases of the ailments mentioned in large type in the advertisements and included on the label. (R. 62, 63). Cross-Examination was brief (R. 64, 65) and involved merely reaffirmation by Colgrove of his good faith. This was the entire record.

In argument the Government conceded that the label did contain adequate directions for use in connection with the four ailments specified by name on the label affixed to the bottles. It claimed, however, that the shipments involved a contempt of the injunction because the labels on the bottles failed to mention the names of the several other ailments which were mentioned in small type in the body of the form of advertisement employed by the petitioner. It was conceded by the Government that had the names of these additional ailments been included on the bottle, the injunction would have been complied with, even on its construction.

A copy of the advertisement which is the sole foundation of this criminal proceeding is attached as Exhibit A. We have marked those portions of this advertisement on which the Government predicates its case. It is conceded by the Government that but for these portions thus marked, (which incidentally mention certain minor skin ailments not featured in block print nor named on the label) the label would be beyond criticism in this suit. (R. 50, 51, 71, 74)

The advertisements in question were published in various newspapers of general circulation (R. 18, 29, 31, 32, 33). The advertisements were inserted by the petitioner corporation. It is not contended by the Government that these advertisements are labelling or that they can be regarded as accompanying the product in any way. (R. 53)

At the conclusion of the trial the court found the petitioners guilty and imposed on the individual petitioner six months jail sentence on each of four of the counts, such sentences to run consecutively and fines of $1,000.00 each on the other four counts. The sentence to the jail term was suspended for a period of five years on probation. (R. 36-38) The corporate petitioner was fined $5,000.00 (R. 34, 35)

In neither the judgment against the individual nor the corporate petitioner did the court find a willful violation of the injunction. It merely held:

> "It Is Adjudged that the defendant has been convicted . . . of the offenses of . . . having shipped in interstate commerce a product which failed to bear specific directions . . . etc.,"

and

> "It Is Adjudged that the defendant is guilty as charged and convicted." (R. 34, 35, 36, 37)

The deficiency in the finding cannot be supplied from the information since that likewise made no charge of willful violation of the injunction. (R. 2-14) The court conceded that the injunction was ambiguous and that the petitioners had not violated its literal terms, in the following language: (R. 77)

> "The defendant is technically, literally correct in the literal reading of the restraining order, that the label be required to contain specific directions for the use of the product—I am abbreviating that—in the treatment of all ills for which such product is prescribed, recommended, and suggested.

"Read literally, the prohibition is against introducing into interstate commerce drugs which do not contain a label containing specific directions for its use in connection with all ills for which it is prescribed and recommended and suggested in the advertising material disseminated by the defendant.

"So, literally read, it is true that in order to violate the language of this injunction it would be necessary for the advertising material to prescribe and recommend and suggest the use of the product for the treatment of a condition or an ill or a disease not referred to in the label. That, manifestly, is not the spirit of the injunction.

"I think the injunction should, possibly, have been worded in the disjunctive instead of the conjunctive. It should have read 'conditions, ills, and diseases for which such product is prescribed or recommended or suggested in the advertising material,' but the manifest spirit must be to read it in the disjunctive, because if the advertising material is prescribed, certainly prescription includes 'recommendation and the suggestion' and there would be no meaning at all left for the words 'recommended and suggested' if the words were used alternatively. As I stated, 'prescribed' includes 'recommended and suggested.'

"My view of it is that the defendant attempted to obey the words but not the spirit of the prohibition."

In resolving the question of the necessary criminal intent required to impose a jail sentence for violating "the spirit of the injunction" the court in a colloquy with counsel held as follows (R. 74):

"Mr. McGann (counsel for petitioner) . . . Mr. Colgrove had no intent of violating this injunction at any time . . . There must be criminal intent.

"The Court: He has to intend to do what he did, doesn't he?

"Mr. McGann: What is it?

"The Court: The intent—

"Mr. McGann: Is not to violate the injunction.

"The Court: —is the intention to do what he did."

Thus the court held that if the defendant violated the injunction mistakenly believing that he was within its terms, nevertheless, since he intended to do what he did, he was guilty of criminal contempt. This ruling deprived petitioners of the presumption of innocence which is the right of every person charged with criminal contempt. It also deprived petitioners of the benefit of the rule that in a conviction for criminal contempt all elements of the offense, which include willful violation, must be proved beyond a reasonable doubt.

THE OPINION OF THE NINTH CIRCUIT COURT OF APPEALS.

The Court of Appeals below affirmed the conviction for criminal contempt (R. 88-97). The opinion did not explicitly discuss the lack of evidence of willful violation, but it did infer bad faith on the part of petitioners because of two other cases involving the same product which the court said were "of significance". *No mention of either case appeared in the record of this proceeding.* One was a case where another corporation and the same individual defendant were convicted of misbranding Colusa Oil and the conviction was reversed. (*Empire Oil and Gas Corp., et al.* v. *United States,* 136 F. (2d) 828 (C.C.A. 9, 1943). The court stated in a footnote (R. 89) that after his conviction had been reversed Colgrove, the individual petitioner, had plead *nolo contendere.* None of the circumstances or the reason for this plea appear. It is, however, a plea not ordinarily permitted in the case of a willful and intentional offense.

The other case is a libel action brought in the Northern District of Iowa seizing the petitioners' product. (*United States* v. *9 Bottles Colusa Natural Oil,* 78 F. Supp. 721). The Court of Appeals below paraphrased a finding in the Iowa Case, saying that petitioners' products "are of no value in the treatment of skin infections; and that their use in some circumstances may even be harmful." In other words, if the Iowa Case is correct petitioner was advertis-

ing a product without curative value and would have committed an offense even if they had followed the injunction as construed by the court below.

The Iowa decision was pending on appeal at the time the court below used it as evidence of bad faith. The findings were affirmed but the order is not yet final since a petition for certiorari has been filed.

We think it plain error for the court to use against petitioners these collateral cases which are not in the record and the circumstances of which petitioners had thus no opportunity to explain. However, since the court did use them we think it is permissible to point out that they show an inconsistent attitude on the part of the Food and Drug Administration toward the defendant which we believe amounts to a tyrannical abuse of the contempt power.

Petitioners at the time of the contempt proceedings found themselves in this situation. According to the District Court of Iowa they could not advertise their product at all. According to the District Court of California they could advertise their product provided they gave adequate directions for use. In this situation petitioners did not go out of business because, rightly or wrongfully, they felt they could reverse the Iowa case on appeal, and therefore the dissolution of their business was not yet necessary. The form of the injunction obtained by the Food and Drug Administration must have given them some hope. They therefore, as the record shows, attempted to comply with the California injunction by giving directions for use which were adequate as a practical matter and were a literal compliance with the injunction.

If certiorari is denied in the Iowa case petitioners will be completely out of business. It is certainly unjust and tyrannical to compel them at the same time to suffer five years of probation in addition to the loss of their business because they did not advertise in a way which the Iowa court had held to be illegal. In other words, the Iowa injunction had the effect of an invitation which entrapped

petitioners into doing what the Food and Drug Administration and the Iowa court had held was a criminal act.

We suggest the inconsistency of these two decisions not as a matter of technical conflict but only to show that what the court was really punishing the defendants for was advertising the oil as a cure for anything. Certainly by no stretch of the imagination can that be called evidence of bad faith against the positive testimony of a defendant who was attempting to stay in business while his rights were being determined. Certainly there is no basis here in justice for both a jail sentence under the California proceedings and in addition the destruction of his business by the Iowa decision.

Finally, we point out that the offense in this case is not the label but the advertisement. Had the petitioners continued to sell the product labelled as a cure for the four diseases in the block print without mentioning the additional diseases suggested in the fine print in testimonials the Government concedes that he would have complied with the injunction. It was not, therefore, the label which was the offense under the Food and Drug Act. It was the fact that the defendant advertised as he did. There was no offense until the advertisement was published. Thus we think that the Food and Drug Administration in this case is attempting to control advertising which is beyond its jurisdiction.

QUESTIONS PRESENTED.

1. Whether in a criminal contempt proceeding for violation of an injunction obtained under the Food and Drug Act the presumption of innocence obtains and proof of guilt must be beyond a reasonable doubt.

2. When an injunction is admitted by the trial court to be ambiguous and where sole evidence on the issue of willful violation is the defendant's testimony that he was in good faith attempting to comply, may the court convict

and impose a heavy penalty on the ground that no further proof of willfulness is required because the defendant intended to do what he actually did.

3. Where a defendant in a criminal proceeding for violation of an injunction is conceded by the court to have obeyed the literal meaning of the restraining order, may the court nevertheless punish him for criminal contempt because he (in the language of the court) "attempted to obey the words but not the spirit of the prohibition".

4. May a defendant be convicted of criminal contempt because of a misunderstanding of an injunction, which is neither explicit nor precise in its commands and which is capable of different interpretations.

5. Where a label is conceded to be not a violation of an injunction if no advertising is published, may the Food and Drug Administration punish the defendant for advertising which is general and does not accompany the products in any way.

REASONS FOR GRANTING THE WRIT.

I.

The Issue Presented by the First Four Questions.

The issue presented by the first four questions is an issue of importance which has not been but should be decided by this Court. It also involves a direct conflict with the applicable decisions of this Court. It relates to the power of the Court to punish for criminal contempt in the absence of a showing of willful disobedience of an injunction. We assert that this conviction for criminal contempt in the absence of any showing of willfulness violates the rule announced by this Court as to presumption of innocence and as to the burden of proof on the Government to produce evidence which establishes guilt beyond a reasonable doubt.

The conviction of contempt in this case involves a construction of the criminal contempt statute which is directly

in conflict with the decisions of this Court and of other Circuits. This Court has held that

> "In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself."
>
> (*Michaelson* v. *U. S.*, 266 U. S. 42, 66, *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418, 444.)

In spite of these decisions the court below regarded the criminal contempt statute as requiring only the finding that the defendant intended to do what he did,—a finding relevant only in a case of civil contempt.

Neither the information nor the judgments against the petitioners contain either a charge or finding of willfulness in the alleged violation of the injunction. Nor does any of the colloquy by the court state that the violation of the injunction found was a willful one other than a brief statement that "the intent is . . . to do what he did." (R. 74 quoted *supra*.) The judgment, for example, reads:

> "It is adjudged that the defendant has been convicted . . . of the offenses of . . . having shipped in interstate commerce, etc.; and in disregard of the injunctions issued . . . " (R. 34)[3]

The contempt statute specifically provides that it is applicable only to a person who "shall willfully disobey" a court order. 28 U.S.C. § 386.

This Court and the lower courts have construed this statute as requiring a deliberate and intentional flouting of the courts process. Thus in *Wilson* v. *North Carolina*, 169 U. S. 586, this Court said:

> "We see no evidence of any *intentional* contempt on the part of relator, and our conclusion is that the rule must be discharged." (Emphasis supplied)

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[3] The appellate court likewise made no finding of willfulness although on the basis of matters not in the record, as we shall see below, it made some statements which indicated that it believed that the violation was not innocent.

In *United States ex rel. Porter* v. *Kroger Grocery & Baking Co.*, 163 F. 2d 168 (CCA 7, 1947), the Court for that circuit held that it is necessary to show intentional violation of a court decree. The court cited with approval (163 F. 2d at 173) from *In re Rice*, (C.C., M.D. Ala., 1910) 181 F. 217, 228, as follows:

> "No one can be punished for a criminal contempt unless the evidence makes it clear that he intended to commit it. To [the] doubt is to be resolved in favor of respondent."

The decision of the court below is in marked opposition to these rulings. We believe the facts show that it reads the word "willful" out of the statute. The facts are that the record presented by the government was a simple stipulation (1) that an injunction had been issued in a certain form, (2) that certain shipments had been made, (3) that the shipments contained labels in a certain form, and (4) that certain newspaper advertising had been used. (R. 24) The government then rested. (R. 27, 49, 56) At most this stipulation could do no more than establish a violation of the injunction.[4] The entire record is in substance in this petition in the advertisement and the label. It was on this record that the court below found a violation. The only other testimony in the entire record was that of petitioner Colgrove. He testified that he understood the injunction required inclusion on the label only of the names of conditions which he advertised in large type and that it was only these conditions for which he believed a remedy was "prescribed, recommended and suggested" in the advertisement. (R. 62, 63) The court conceded that this was so if the letter of the injunction was to be considered but stated that its spirit was otherwise and petitioner had violated the spirit of the injunction. (See R. 78. "My view of

[4] In fact it could not even do this. See the testimony of petitioner Colgrove that the conditions mentioned in the advertising and not on the label were merely different names for or special kinds of the ailments specified on the label (R. 62, 63). No contrary evidence was offered by the government.

it is that the defendant attempted to obey the words but not the spirit of the prohibition.")

While this might perhaps have been a permissibly broad construction of an injunction for the granting of civil relief by way of civil contempt (which we do not concede), it provided no basis whatever for a conviction of "willful" contempt as required by the criminal contempt statute. Indeed, petitioner's testimony not only protested his attempt to comply with the injunction but gave specific details concerning recalling said product for relabelling. (R. 63) It was also clear that the government was contending only that the inclusion of the names of certain other conditions on the label was required. Had those names been included, the government made it clear that the directions for use under its construction would have been adequate. (R. 50, 51, 74) Of course, the use for all skin conditions was the same, i.e., the Colusa oil was to be applied to the skin eruption by rubbing it in morning and night. Thus, it was plain that the inclusion of the names of the ailments mentioned in small type in the body of the advertisement would have been a simple matter had petitioner so understood the injunction. No evidence appears in the record that any gain could be obtained by them from failing to include these names, nor any evidence of bad faith.

Accordingly, it was on a bald stipulation of the commission of certain acts that the court held petitioners guilty of criminal contempt. It is submitted that if the court's finding is a finding of willful contempt, it is based on a construction of the criminal contempt statute opposed to that of this Court and the other courts mentioned above.

The appellate court's opinion considered the question of whether the injunction required the inclusion on the label the names of the additional diseases. It found that they were required. It has no specific discussion of willfulness, but it appears to have given the matter some consideration.

On this point, it referred only to matters outside the record. It cited petitioner's "court experience in this re-

spect" which it stated "is of significance". (R. 89) It then cited a district court case by its Federal Reporter citation (78 F. Supp. 721) which it said found that the oil in question was "of no value in the treatment of skin affections; and that their use in some circumstances may even be harmful."[5] It also referred to "numerous actions" by the government including a conviction which had been set aside by the very Ninth Circuit in question. *None of this material was in the record before the District Court.* It was not introduced by the government and petitioners of course had no opportunity to know that the court was considering such matter or to rebut the inferences by additional evidence or explanation. The appellate court is thus absolutely without foundation in the record for its statement that "Colgrove was quick to seize upon the discrepancy, and he steered his course so as to sail as closely into the wind as he thought he safely could." (R. 93)

The procedure of the Court in thus going outside the record to attempt to supply a showing of willfulness for which the record contained no support is in direct contravention of the rulings of this Court. See *Congress & Empire Spring Co.* v. *Knowlton*, 103 U. S. 49, 61, where the Court specifically refused to consider even identical litigation between the parties in another court and specifically stated "We cannot consider facts not brought to our notice by the record." (at 61)[6]

The procedure of the courts below—first of the district court in imposing a severe sentence for willful criminal

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[5] The ruling in that case was of course not final and a petition for certiorari is being filed in that matter concurrently with the present case.

[6] The entire passage from the opinion is as follows:

> "It is suggested by counsel for plaintiff in error, that the Court of Appeals of the State of New York has in this identical suit, upon the same state of facts, adjudicated the rights of the parties, and this court ought to consider the questions raised in this case as *res judicata*.
>
> "The reply to this suggestion is, that it nowhere appears in the record that this case was ever before the Court of Appeals, or that it was ever decided by any court except the United States Circuit Court for the Northern District of New York, from which the case has been brought to this court on error. We cannot consider facts not brought to our notice by the record."

contempt on a record devoid of evidence of willfulness and then of the appellate court in attempting to bolster a weak record by affirming on the basis of facts not in the record—fly in the face of settled decisions of this court. The power of the courts to punish for criminal contempt as so extended present a real danger of tyrannical infringement of the rights of citizens. The questions presented by the conduct of this litigation are of obvious importance. Review should be granted so that basic principles laid down by this Court in the past may be reaffirmed beyond possibility of misconstruction.

II.

The Issue Presented by the Fifth Question.

The issue presented by the fifth question is of importance in the construction of the Federal Food and Drug Act with respect to the control of the Food and Drug Administration over advertising in newspapers of general circulation as distinguished from pamphlets and other literature accompanying the product. Here we have a label which is concededly legitimate (so far as the California case is concerned) so long as no advertising of additional diseases is published. Upon publication of advertising the offense is committed. This we assert is control of advertising, not control of labels. The Federal Trade Commission has jurisdiction on the question whether advertising constitutes an offense.

The criminal contempt statute is violated only if the action held to be a contempt is "of such character as to constitute also a criminal offense". 28 U.S.C. § 386. Thus, to sustain its finding of contempt the courts below were required to find not only that the injunction had been violated but that the acts of petitioners constituted also a criminal offense. Petitioners in urging that they are not guilty of a criminal offense are thus not, as the court below stated, merely attacking the injunction collaterally (R. 92) but are

rather denying the existence of an independent statutory prerequisite to a conviction for criminal contempt.

The Court of Appeals for the Ninth Circuit apparently found the criminal offense to be a violation of 21 U.S.C. § 352(f)(1). That section provides that a drug is misbranded if it does not contain "adequate directions for use." (R. 90) That section as construed by the court below and by the Federal Security Administrator (Section 1.106(a), Title 21, Code of Federal Regulations, 1949 Edition) requires that in order for labelling to bear adequate directions for use it must include directions for use specifically naming each condition for which the drug "is prescribed, recommended or suggested . . . " not only in its labelling but also "in its advertising disseminated or sponsored by or on behalf of its manufacturer or packer . . . "

At the last term of court in the cases of *Kordel* v. *U. S.*, — U. S. —, 69 S. Ct. 106, and *United States* v. *Urbuteit*, — U. S. —, 69 S. Ct. 112, this Court held that the Federal Food, Drug and Cosmetic Act gave power to the Food and Drug Administration to control literature advertising a product provided that literature was in the nature of labelling and accompanied the product. It specifically refused to pass on the power of the Food and Drug Administration over advertising not constituting labelling. It found it unnecessary in those cases to mark out further the line of jurisdiction between the Food and Drug Administration and the Federal Trade Commission over advertising, holding that the fact that the advertising involved in those cases was in the nature of labelling excluded it from the jurisdiction of the Federal Trade Commission. (See 69 S. Ct. at 110)

In the present case it is not contended by the Government that the advertising in question is labelling (R. 53). The advertising is advertising in newspapers of general circulation. It is clearly advertising other than labelling within the jurisdiction of the Federal Trade Commission under 15 U.S.C. § 52(a) and 55(a), and that agency would have had authority to proceed if it believed the advertising false.

The Food and Drug Administration, however, has made a claim, sustained by the court below, that the authority given it to require "adequate directions for use" in labelling gives it power to review newspaper advertising and to compel a statement in the label of all conditions mentioned in newspaper advertising. Thus in the present case the labelling would be conceded to be adequate if the advertizing had not mentioned other conditions. It was the advertising, not the label, which made the offense. We believe that this is an encroachment upon the jurisdiction reserved under the Federal Trade Commission and which Congress specifically refused to transfer to the Food and Drug Administration.

The Food and Drug Administration has asserted a power to control newspaper advertising which is not labelling by use of its power over labelling. It has asserted this power not only in the present case but by a general interpretative regulation as sustained by the court below. It is submitted that the line of demarcation created by Congress between the Food and Drug Administration and the Federal Trade Commission in two separate and carefully distinguished acts both relating to interstate commerce in drugs has not been and should be determined definitely by this Court.

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

THURMAN ARNOLD,
ARNOLD, FORTAS & PORTER,
1200 - 18th Street, N.W.,
Washington, D. C.

WALTER M. GLEASON,
Merchants Exchange Building,
San Francisco, California,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No.

CHESTER WALKER COLGROVE and COLUSA REMEDY COMPANY (a corporation),
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. PROOF BELOW WAS INSUFFICIENT.

(A) The Law.

This Honorable Court has, on various occasions, emphasized that:

> "In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond reasonable doubt and the defendant may not be compelled to be a witness against himself."
>
> (*Michaelson* v. *U. S.*, 266 U. S. 42, 66; *Gompers* v. *Buck's Stove & Range Co.*, 221 U. S. 418).

> "In a proceeding for criminal contempt . . . The burden is on the government to prove the guilt of the defendants beyond a reasonable doubt. There is no shifting of the burden of proof." (*U. S.* v. *Balaban*, 26 F. Supp. 491, 498, 499).

Therefore, it was incumbent upon the government to prove herein, beyond a reasonable doubt, every element and fact necessary to show a criminal contempt. Among other things, this required proper proof of a "*willful*" disobedience of this injunction. This Honorable Court has heretofore clearly defined, in *Screws* v. *United States*, 325 U. S. 91, at 101, the significance of the word "willful" in such a criminal statute:

> "We recently pointed out that 'willful' is a word 'of many meanings, its construction often being influenced by its context.' * * * But 'when used in a criminal statute it generally means *an act done with a bad purpose*. . . .' [citing cases] *In that event something more is required than the doing of the act proscribed* by the statute. Cf. *United States* v. *Balint*, 258 U. S. 250, 66 L. Ed. 604, 42 S. Ct. 301. *An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime.* [citing cases] . . ." [Emphasis supplied]

(B) Application of These Settled Principles to the Facts Herein.

(1) No proof of inadequacy of directions for use.

The gist of the injunction herein is its requirement that the Colusa label contain "adequate directions" for the use of this product in the treatment of the diseases for which the oil:

> "is prescribed, recommended, and suggested, *in the advertising material . . . of defendants.*" (R. 3).

The Information below shows on its face (R. 4) that:

(1) *All the shipments of Colusa Oil complained of bore labels,*

and

(2) *All these labels contained "directions for use of this product."*

It would seem elementary, under this state of facts, that in order to establish a criminal contempt, the government was required properly to allege and prove that:

(1) Petitioners, in their advertising matter, *prescribed* Colusa Oil for certain diseases or ills,

and

(2) That the "directions for use" on the Colusa labels were *not* adequate for the use of this product in the treatment of the diseases for which it was thus *prescribed,*

and

(3) That defendants *knew* these "directions for use" to be inadequate.

The government completely failed to prove these essentials, or any thereof.

While the very core of this injunction is the requirement of "adequate directions" for use, the government did not even *try* to prove that the "directions for use" on the Colusa labels were *not* adequate. There is a complete absence of any such proof.

To the contrary, the government in effect conceded below that these directions for use were adequate. It at least impliedly conceded that they were adequate for the *four diseases named on the Colusa label* (psoriasis, athletes foot, eczema and leg ulcers). *No question was raised as to the*

propriety or adequacy of the label insofar as these diseases are concerned. These four diseases are generally recognized as the severest and most difficult and baffling of the skin diseases. The other minor ailments incidentally mentioned in the Colusa advertisement are far less severe. In fact, to a large degree they are but physical manifestations of the same generic ailments. There was direct evidence to this effect (R. 62, 63) and there was no proof at all that they were different conditions or ailments. For example, "itch" is common to all the aforementioned severe skin afflictions (R. 62), and poison oak and poison ivy are among the eczemas (R. 62). It would seem quite evident that "directions for use" which are adequate for the use of this oil in the treatment of psoriasis and eczema would be entirely adequate in the treatment of these minor ailments which are to a large degree but minor manifestations of the aforementioned serious diseases. Particularly is this so when it is realized that this oil is applied in *exactly the same way* in the treatment of all these skin ailments. It is directly applied to the skin in the same manner as the host of other oils, ointments, petroleum jellies and similar preparations sold by American drug stores for skin treatments.

In fact, there is a serious question as to whether, under the Food & Drug regulations, any "directions for use" were required for this Colusa oil. Not every drug requires a label containing "adequate directions" for use. The Food & Drug regulations (21 C. F. R. (1949 ed.) § 1.106(g)) expressly state that a drug is exempt from these requirements (of clause (1) of Section 502(f) of the Act) when it is of such a nature that:

> "with respect to common uses, adequate directions for which are known by the ordinary individual."

Certainly, the application of an oil (or ointment, jelly, etc.) to the skin is such a common and simple affair that it would seem that no specific or other directions for use would be required.

The government's counsel in effect conceded below the adequacy of these "directions for use" because he conceded that the Colusa label would have been beyond criticism if the names of the "omitted" diseases (poison oak, poison ivy, itch, etc.) had been added to the Colusa label:

> "The Court. . . . Is it the Government's contention that this advertisement becomes in effect a part of the label?
>
> "Mr. Klinger. Not necessarily a part of the label, your Honor, no; but it is in conflict with the court's order heretofore entered, which is, pursuant to the statute, that the defendants are not in their advertising, after those injunctions, to recommend, suggest or prescribe this product for any conditions, . . . *other than those named on the label.*" (Emphasis ours). (R. 53).
>
> * * *
>
> "The Court. The entire complaint here is that they were not included." (R. 74) (i.e. on the label).
>
> * * *
>
> "The Court. Does the Government agree that this (i.e. the new label) now complies?
>
> "Mr. Klinger. No. Of course, your Honor, the first eight counts are based on that label and say that that label does not comply with the order because the advertising which is disseminated in connection with this product bearing this label recommends, suggests and prescribes that product for those other nine conditions referred to in the information" (R. 50, 51).

In other words, had these "omitted" diseases been added to the label, it would have been all right. This necessarily means that the "directions for use" on that label were adequate for these "omitted" diseases.

(2) No proof of any intentional disobedience of this vague writ.

Not only was there no proof of *any* disobedience of this injunction or of any *intentional* violation thereof, but, to

the contrary, the undisputed evidence below *shows a conscientious effort by petitioners to comply.* This evidence (R. 63) shows that immediately after the issuance of the preliminary injunction by the District Court, petitioners, in a diligent effort to comply with this order:

> (1) Suspended *all* shipments, *intrastate* as well as *interstate* (even though the court decree did not apply to *intrastate* shipments).
>
> (2) Destroyed their supplies of old labels and printed new labels at substantial expense.
>
> (3) Recalled, at substantial expense, previous shipments of Colusa Oil from various states, for relabeling (even though defendants could have proceeded freely to sell and distribute these pre-injunction shipments to such states, with impunity insofar as this injunction was concerned).

This evidence stands wholly undisputed.

Furthermore, the defendants expressly disclaimed, in the sworn testimony below, any intent to violate this injunction. Mr. Colgrove testified:

> "Q. There was no intent on your part at any time to violate this injunction?
> A. Positively not.
> Q. You did everything you felt that was in your power towards conforming with it?
> A. I did." (R. 63).

(3) Petitioners did not prescribe Colusa Oil for poison oak, poison ivy, etc.

As shown above, an indispensable link in the government's chain of proof is a showing that petitioners "prescribed, recommended and suggested" this oil for these "omitted" diseases (poison oak, etc.).

The government and the lower courts took the position that the aforementioned incidental mention (in the Colusa

advertisement), of poison oak, etc., constituted a "prescribing" of this product for said diseases.

We respectfully submit that under any fair or proper interpretation this incidental mention of these diseases did not constitute a "prescribing" therefor. "Prescribing" (according to Webster) means "to direct, designate or order for the use of, as a remedy." Furthermore, the testimony of petitioner Colgrove makes it very clear that petitioners did not intend to, or think they were, by such reference, "prescribing" this product for said diseases:

> "A. I did not prescribe for any of the material in the rest of the advertisement. That is one of your allegations.
>
> Q. You say you were not 'prescribing.' Were you 'recommending and suggesting' only? Is that the point?
>
> A. I was not 'prescribing, recommending and suggesting.' I was conforming with the decree, in my opinion, according to my literal interpretation of it." (R. 64-65).

II. NO SUFFICIENT PLEADING OF A CRIMINAL CONTEMPT.

(A) The Law.

It is a cardinal principle of criminal pleading that the indictment or information must allege the facts of the alleged offense *with precision and certainty,* and that vague and indefinite allegations will not suffice. The following text statement epitomizes the many judicial expressions of the aforementioned legal principle, viz:

> "Every material fact and essential ingredient of the offense—every essential element of the offense—must be alleged with precision and certainty, or, as has been stated, every fact which is an element in a prima facie case of guilt must be stated in the indictment . . . The offense and the essential elements thereof must be alleged in positive terms, and not by way of recital or mere legal conclusions, unaided by intendment or inference." (27 *American Jurisprudence,* p. 621, Sec. 54).

The following are a few of the many cases exemplifying this settled legal principle, viz:

U. S. v. *Hess,* 124 U. S. 483;
White v. *U. S.* (CCA 10, 1933) 67 F. (2d) 71;
Jarl v. *U. S.* (CCA 8, 1927) 19 F. (2d) 891;
Clary v. *Commonwealth,* 163 Ky. 48, 173 S.W. 171;
Merwin v. *People,* 26 Mich. 298, 12 Am. Rep. 314;
Collins v. *U. S.* (CCA 9, 1918) 253 Fed. 609;
U. S. v. *Morse,* 287 F. 906 (D. C. D. Conn., 1923);
Harris v. *U. S.* (CCA 8, 1939) 104 F. (2d) 41;
See Rule 42(b), Rules of Criminal Procedure.

In most of these cases, the upper court reversed a conviction, after trial below, because of the insufficiency of the indictment or information.

It has been held in a number of cases that the failure adequately to allege the facts constituting a crime is tantamount to a denial of due process of law:

Fontana v. *United States* (CCA 8, 1919) 262 F. 283;
United States v. *Safeway Stores* (D. C. Kan., 1943) 51 F. Supp. 448;
United States v. *Johnson* (D. C. Del., 1943) 53 F. Supp. 167;
United States v. *Ferranti* (D. C. N. J., 1944) 59 F. Supp. 1003;
McLaughlin v. *State of Indiana* (1873) 45 Ind. 338.

(B) Application of These Principles to the Information Herein.

The information below completely fails to comply with this basic rule of criminal law. It fails to allege, either generally or specifically, facts to show:

(1) That the "directions for use" are inadequate.

(2) That petitioners *knew* this to be so or otherwise *willfully* violated this injunction.

(3) That petitioners "prescribed" this oil for the diseases incidentally mentioned in fine print.

The following is the effort of the government to allege a criminal contempt:

> "That the labels on defendants' product, as shipped to said Schlintz Bros. Drug on July 9, 1947, disregard the requirements of the permanent injunction described in Count I since they fail even to attempt to bear adequate directions for use of the product in the treatment of all ills, conditions and diseases for which the product is prescribed, recommended and suggested in the advertising material disseminated and sponsored by the defendants." (R. 6).

This allegation in Count Three is typical of the language employed in the other counts.

It is clear, we respectfully submit, that these allegations do not comply with the settled legal requirements of such a pleading. Not only is this entire allegation simply a general legal conclusion of the pleader, but it does not either directly or otherwise allege the inadequacy of the directions for use or facts to show wherein they are inadequate, nor does it contain any averment that petitioners *knowingly* or *willfully* violated this injunction.

III. THE INJUNCTION BELOW WAS SO VAGUE AND INDEFINITE AS NOT TO CONSTITUTE AN ADEQUATE BASIS FOR THIS CONTEMPT PROCEEDING.

To serve as the basis for a contempt proceeding an injunction or other order must be clear and specific, and the party bound by it must be able to determine from its terms what he may and may not do. An excellent statement of the law on this point is:

> "To hold a person guilty of contempt for violating an injunction, the acts constituting the contempt must be clearly and specifically prohibited by the terms of the injunction. *Mattos* v. *Superior Court*, supra, 30 Cal. App. (2d) at page 649, 86 P. (2d) 1056, and cases there cited; *American Foundry & Mfg. Co.* v. *Josam*

Mfg. Co., 8 Cir., 79 F. (2d) 116, 118; *City of Campbell* v. *Arkansas-Missouri Power Co.*, 8 Cir., 65 F. (2d) 425, 427, 428. The party bound by an injunction must be able to determine from its terms what he may and may not do; he cannot be held guilty of contempt for violating an injunction that is uncertain or ambiguous (Ibid.), just as he may not be held guilty of violating a criminal statute that fails to give him adequate notice of the prohibited acts." (*Brunton* v. *Superior Court* (Cal. 1942), 20 Cal. (2d) 202, at 205, 124 P. (2d) 831).

We respectfully submit that the injunction below is utterly indefinite and vague.

IV. CONTEMPT PROCEEDINGS NOT JUSTIFIABLE IN THIS CASE.

We have endeavored to demonstrate hereinbefore that there was neither adequate pleading nor proof of a criminal contempt herein. We believe it is very clear that no contempt existed or was established. We believe the record clearly shows the contrary.

However, the very least which can be said in favor of petitioners is that it is extremely doubtful whether petitioners willfully or otherwise violated this vague injunction. Under these circumstances, these contempt proceedings are not justifiable.

This Honorable Court has spoken on this subject as follows:

> "Process of contempt is a severe remedy, and should not be resorted to where there is fair ground of doubt as to the wrongfulness of the defendant's conduct." (*California Artificial Stone Paving Co.* v. *Molitor*, 113 U. S. 609, 618).

To the same effect:

City of Campbell v. *Arkansas-Missouri Power Co.*, (CCA 8, 1933) 65 F. (2d) 425, 428;

Hanley v. *Pacific Livestock Co.* (CCA 9, 1916) 234 Fed. 522;

Accumulator Co. v. *Consolidated Electric Storage Co.*, 53 Fed. 793, 796 (C. C. D. N. J., 1892);
General Electric Co. v. *McLaren*, 140 Fed. 876, 878 (C. C. D. N. J., 1905);
General Mfg. Corporation v. *Gray* (D. C. W. D. Okla., 1931) 48 F. (2d) 602, 604.

CONCLUSION.

Petitioners made a good faith effort to comply with this vague injunction. They thought they were complying. And they did comply. There was neither adequate pleading nor proof that they did not comply or that they *willfully* disobeyed this writ.

The judgments below are clearly contrary to decisions of this Honorable Court governing such criminal proceedings.

WHEREFORE, it is respectfully submitted that this petition for certiorari should be granted.

THURMAN ARNOLD,
ARNOLD, FORTAS & PORTER,
WALTER M. GLEASON,
Attorneys for Petitioners.

November 1949.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 457

CHESTER WALKER COLGROVE AND COLUSA REMEDY COMPANY (A CORPORATION), PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 88-95) is reported at 176 F. 2d 614.

JURISDICTION

The judgment of the Court of Appeals was entered August 8, 1949 (R. 96), and a petition for rehearing was denied September 19, 1949 (R. 97). On October 17, 1949, by order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to November 18, and the petition

was filed November 17, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence supports the judgments of the District Court holding petitioners guilty of contempt.

2. Whether the preliminary and permanent injunctions issued by the District Court are subject to attack in this contempt proceeding.

STATUTES INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U.S.C. 301 *et seq.*, provides in pertinent part:

> Sec. 301. The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any * * * drug * * * that is adulterated or misbranded. [21 U.S.C. 331(a).]
>
> Sec. 302. (a) The district courts of the United States * * * shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., 1934 ed., title 28, sec. 381), to restrain violations of section 301, except paragraphs (e), (f), (h), (i), and (j). [21 U.S.C. 332(a).]

(b) In case of violation of an injunction or restraining order issued under this section, which also constitutes a violation of this Act, trial shall be by the court, or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of section 22 of such Act of October 15, 1914, as amended (U.S.C., 1934 ed., title 28, sec. 387). [21 U.S.C. 332(b).]

Sec. 502. A drug or device shall be deemed to be misbranded—

* * *

(f) Unless its labeling bears (1) adequate directions for use; * * *. [21 U.S.C. 352(f).]

Section 268 of the Judicial Code, 28 U.S.C. (1946 ed.) 385, now 18 U.S.C. (1948 rev.) 401, provided:

The courts of the United States shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except * * * the disobedience or resistance * * * by any party * * * to any lawful writ, process, order, rule, decree, or command of the said courts.

STATEMENT

The facts in this case are not in dispute. As the opinion of the Court of Appeals points out (R. 89-90), for a number of years petitioner Colgrove has

been engaged in the marketing of drug products represented to be remedies for a number of skin diseases. The products consist of ordinary unrefined petroleum oil and have been shown to be without any therapeutic value (See No. 458, at this Term, C.R. 5-19). The Government instituted numerous libel for condemnation proceedings against these products in all parts of the country on the ground that they were misbranded under Section 502(a) of the Federal Food, Drug, and Cosmetics Act, 21 U.S.C. 352(a) (sometimes hereinafter referred to as "the Act"), in that their labeling contained false and misleading therapeutic claims. Most of these actions resulted in the entry of default decrees of condemnation. (Notices of Judgment under the Federal Food, Drug, and Cosmetics Act, issued by the Federal Security Agency pursuant to 21 U.S.C. 375(a), April 1946, Drugs and Devices No. 1383, and December 1947, Drugs and Devices No. 2087, which together comprise 110 different actions).[1] A group of such consolidated seizure actions was recently tried in the Northern District of Iowa and resulted in a decree of condemnation. *United States* v. *9 Bottles* * * * *"Colusa Natural Oil,"* 78 F. Supp. 721, affirmed *sub nom. Colusa Remedy Co.* v. *United States,* 176 F. 2d 554 (C.A. 8), petition for a writ of certiorari pending, No. 458 at this Term.

---

[1] Judicial notice has been taken of such Notices of Judgment. *Libby, McNeill & Libby* v. *United States,* 148 F. 2d 71, 73, fn. 3 (C.A. 2).

In 1942, petitioner Colgrove and the Empire Oil and Gas Company, which he controlled, were prosecuted criminally in the District Court for the Northern District of California. The issue in that case was whether the labeling of the oil was false or misleading in representing it as useful in the treatment of eczema, psoriasis, acne, ringworm, athlete's foot, burns, cuts, poison ivy, and poison oak. After a jury trial, the defendants were convicted. The Court of Appeals for the Ninth Circuit reversed on the ground that a witness produced by the defendants was competent to answer certain questions excluded by the trial court. *Empire Oil & Gas Corp.* v. *United States,* 136 F. 2d 868. Upon remand, the defendants pleaded nolo contendere, and sentences of fine and imprisonment were imposed (R. 89).

In 1945 petitioners resorted to the scheme of failing to mention in the labeling of the oil any of the ailments or diseases for which it was prescribed or recommended (R. 23, 89-90). The representations as to therapeutic claims in the treatment of specified ailments were supplied by extensive newspaper advertising (R. 90). However, under Section 502(f) (1) of the Act, *supra,* p. 3, a drug is deemed misbranded if its labeling fails to bear adequate directions for use. Upon complaint by the Government for injunctive relief, the District Court for the Southern District of California found that this new labeling used by petitioners failed to bear adequate directions for use in the

conditions or diseases for which the oil was prescribed, recommended, and suggested in their advertising. The court issued a preliminary injunction on February 24, 1947, restraining petitioners from shipping "Colusa Natural Oil" or any like product interstate—

> without a label containing specific directions for the use of such product in the treatment of all conditions, ills and diseases for which such product is prescribed, recommended, and suggested, in the advertising material disseminated or sponsored by or on behalf of the defendants or either of them; which directions shall include the quantity of the dose (including quantities for persons of different ages and different physical conditions) to be taken or applied in the treatment of each of such conditions, ills and diseases, as well as the recommended frequency and duration of administration or application of such dosage. [R. 2-3.]

On April 23, 1947, with the written consent of petitioners, the court issued a permanent injunction using the identical language quoted above, except that the words "adequate directions" were substituted for the words "specific directions" (R. 3).

Petitioner Colgrove understood the requirement of the injunction that the labels on the products were required to state the diseases and conditions for which they were recommended in the advertising (see R. 59). A new label was devised, which stated that Colusa Natural Oil was "intended for

use in treatment of Psoriasis, Eczema, Athlete's Foot and Leg Ulcers" (R. 22).[2] Petitioners then changed their advertising to highlight the same four disease conditions which they listed in their new label, namely, psoriasis, eczema, athlete's foot, and leg ulcers. However, the body of the advertising continued, as before, to give glowing reports of benefits derived in these and eight other conditions. (Pl. Ex. 1, R. 20.) Thus, under the heading, "SUMMARY OF CLINICAL REPORTS ON 28 CASES," there is a quotation of a report allegedly received from a Texas doctor that with this oil he had completely cured patients suffering from psoriasis, eczema, leg ulcers, athlete's foot, poison ivy, and poison oak. Similarly, under the heading, "THOUSANDS OF DOCTORS ARE COLUSA CUSTOMERS—EXCERPTS FROM A FEW OF THEIR REPORTS," there are alleged quotations describing cures of the following diseases: eczema, poison ivy, athlete's foot, leg ulcers, bed sores, burns, psoriasis, acne, ringworm. Under the heading, "EXCERPTS FROM REPORTS BY DRUGGISTS," preceded by the statement, "Druggists in 17 states report 89 stubborn cases where Colusa succeeded after other medicines and doctoring failed," there are reports of cures of eczema, athlete's foot, scaley red face, psoriasis, and acne.

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[2] The condemnation proceedings involved in *Colusa Remedy Co.* v. *United States*, now pending on petition for a writ of certiorari, No. 458 at this Term, arose out of the use of this new label.

The present proceeding arose upon the filing by the United States Attorney in October 1947 of an information in nine counts charging criminal contempt in violating the preliminary and permanent injunctions issued earlier that year. Each count was based upon a different interstate shipment of Colusa Natural Oil which bore the new label recommending the drug for psoriasis, eczema, athlete's foot, and leg ulcers. (R. 2-15.) In conjunction with these shipments, petitioners launched an extensive advertising campaign specifically directing prospective customers to the drug stores that were the consignees of these shipments. (R. 29-32, 59-60). This advertising, summarized above, held out unequivocal promises of benefit not only in the treatment and cure of psoriasis, eczema, athlete's foot and leg ulcers (the diseases mentioned in the new label), but also in the treatment and cure of poison ivy, poison oak, bed sores, burns, acne, ringworm, scaley red face, and itch conditions, none of which were mentioned in the new label. It was alleged that petitioners thereby violated the injunctions in that the labels did not contain directions for use in the treatment of all conditions and diseases for which the product was prescribed, recommended and suggested in the advertising.

Petitioners stipulated that the facts alleged in the information were true, without admitting, however, that their advertising prescribed, recommended and suggested the use of the drug in the treatment of diseases and conditions not mentioned

in the label (R. 24). They also waived a jury trial and special findings of fact under Rule 23(c), F. R. Crim. P. (R. 25). After trial before the court, petitioners were found guilty of criminal contempt as charged in counts 1-8, and not guilty as to count 9 (R. 78-79). Petitioner Colusa Remedy Company was sentenced to pay fines totalling $5000 (R. 34-35). Petitioner Colgrove was sentenced to pay a fine of $1000 on each of counts 3, 5, 7 and 8 and to six months imprisonment in a jail-type institution on each of counts 1, 2, 4 and 6, to run consecutively. Execution of his imprisonment sentences was suspended for a probationary period of five years on condition, among others, that he pay the fines imposed upon him. (R. 36-38.) The judgments were affirmed on appeal (R. 96).

ARGUMENT

The petition proceeds upon the theory that all that was established was a technical violation of an injunction; that there was no proof beyond a reasonable doubt of wilful disobedience. The issue thus asserted is said to relate to the power of the District Court to punish for criminal contempt in the absence of wilful disobedience of the injunction. It is said that the convictions involved a construction of the applicable contempt statute which is in direct conflict with the decisions of this Court.

There is no basis for these claims. In the first place, petitioners rely upon the wrong statute, and, secondly, the record demonstrates that there

was substantial evidence to establish beyond a reasonable doubt deliberate violations of the injunction.

1. Petitioner Colgrove is a law school graduate (R. 65). He has full knowledge and understanding of the injunction, to which he consented. It is clear that he made a thorough study of its terms and understood them. The injunction required that the label of the product contain adequate directions for use in the treatment of all the conditions, ills and diseases for which the product "is prescribed, recommended and suggested." Colgrove testified that he analyzed the injunction and interpreted the language "prescribed, recommended and suggested" as meaning all three, and not "prescribed, recommended *or* suggested," or any one of them. He consulted a standard dictionary and a law dictionary as to the definition of "prescribed." (R. 61-62.) He testified (R. 63):

> I relied upon the common sense conclusion that I was only advertising those diseases that are in the large type; and my literal interpretation of "prescribed, recommended, and suggested," the label not carrying any specific references to those diseases [enumerated in testimonial part of the advertising] and no specific references as to the instructions as to the use for those particular conditions under those names.

In other words, Colgrove reached the conclusion that he was prescribing, recommending and sug-

gesting the drug for the four diseases (psoriasis, athlete's foot, eczema and leg ulcers) mentioned in large type at the top of the advertising, but not for the other diseases and conditions for which the product was held out as a cure by means of the testimonial parts of the advertising. It was also his conclusion that he was not prescribing the oil for any condition when he merely quoted from allegedly scientific reports and letters of satisfied users. Thus, he contends that he acted in good faith and that there is no showing that the violations were wilful.

There is no claim here of mistake, inadvertence, or excusable neglect. Colgrove did that which he deliberately intended to do. He relied upon his own judgment as to the scope of the decree and assumed a calculated risk that the advertisements would not constitute a violation. In making his private determination as to the scope and effect of the injunction, he acted at his peril. It is a well-recognized rule of criminal law that every man is presumed to intend the legitimate consequences of his own act. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. "The color of the act determines the complexion of the intent." See *Agnew* v. *United States,* 165 U. S. 36, 53. While it is true that no one may be punished for contempt unless the evidence makes it clear that he intended to commit it, this does not mean that a defendant may be heard to say

that he did not intend to defy the authority of the court when he admits that he deliberately committed the act constituting the defiance. Petitioners certainly were not warranted in acting upon their own judgment and in relying upon their own opinion as to the meaning of the decree. Since they made their own decision and accepted the risk of their own judgment in violating the injunction, the violations were wilful ones.[3]

This proceeding was not instituted, as petitioners assume (Pet. 2), under Section 21 of the Clayton Act (28 U.S.C. (1946 ed.) 386, now 18 U.S.C. (1948 rev.) 402), which provides that any person who *wilfully* disobeys any lawful order of any district court, etc., shall be proceeded against for contempt. Section 24 of the Clayton Act (28 U.S.C. (1946 ed.) 389, now 18 U.S.C. (1948 rev.) 402), specifically provided that:

> Nothing herein contained shall be construed to relate to contempts committed * * * in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing.

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[3] The word "wilful" is employed to characterize a thing done without ground for believing it lawful. *United States* v. *Murdock*, 290 U.S. 389, 394.

Since the injunction suit upon which the contempt proceeding in this case is predicated was instituted in the name of and on behalf of the United States pursuant to the authority of Sections 302(a) and 307 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 332(a) and 337), Section 21 of the Clayton Act has no application. See *Hill* v. *United States ex rel. Weiner,* 300 U. S. 105, 107.

This proceeding was instituted under Section 268 of the Judicial Code, 28 U.S.C. (1946 ed.) 385, *supra,* p. 3, under which the courts of the United States are given the power to punish contempts of their authority. Such power extends to the "disobedience or resistance * * * by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." In contrast to Section 21 of the Clayton Act, the word "wilful " nowhere appears in Section 268. Moreover, there are a number of authorities for the proposition that disobedience of a court order, without more, is punishable as contempt, and that the good faith or intent of the defendant may serve only in mitigation of the penalty and not as a defense.[4] In any event, the violations here were wilful.

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[4] High, *Injunctions* (4th ed), Vol. 2, § 1418; *Merrimack River Sav. Bk.* v. *Clay Center,* 219 U. S. 527, 536; *Rodgers* v. *Pitt,* 89 Fed. 424, 429 (C.C. D.Nev.); *In re Braun,* 259 Fed. 309 (C.C. M.D. Pa.); *United States* v. *Sanders,* 290 Fed. 428 (W.D. Tenn.); *Eustace et al.* v. *Lynch,* 80 F. 2d 652 (C.A. 9); *Lustgarten* v. *Felt & Tarrant Mfg. Co.,* 92 F. 2d 277 (C.A. 3).

Complaint is made because the District Court, having found that petitioner Colgrove was technically correct in the literal reading of the injunction, nevertheless based its decision upon the violation of the spirit of the order (R. 77-78). But injunctions are to be honestly and fairly obeyed. The violation of the spirit of an order is considered a breach, even though the strict letter may have been observed. No scheme will be allowed to succeed if its effect constitutes a substantial violation. High, *Injunctions* (4th ed.), Vol. 2, §1446; *Securities and Exchange Commission* v. *Okin,* 137 F. 2d 862 (C.A. 2); *John B. Stetson Co.* v. *Stephen L. Stetson Co.,* 128 F. 2d 981 (C.A. 2).

It is also asserted that the decree was vague and indefinite and that petitioners should not be convicted because of a misunderstanding of its terms. If petitioners were in doubt as to the scope or extent of the injunction, which was entered pursuant to consent, they could have petitioned the District Court for a clarification or construction of the decree. *Regal Knitwear Co.* v. *Labor Board,* 324 U. S. 9, 15.

Petitioners contend that the Government failed to prove that the directions for use on the labels were inadequate. The short answer to this contention is that the labels bore no directions at all for the use of the drug in the conditions referred to in the testimonial part of the advertising, as the injunction fairly required. Furthermore, it was

not intended that they should. As we have shown, Colgrove had determined that the advertising "prescribed, recommended, and suggested" the product as efficacious only in the treatment of the four ailments mentioned at the top of the advertisement, and not for any of the diseases and conditions mentioned in the testimonials in fine print (R. 62). It may be, as petitioners suggest, that directions for use which are adequate in the treatment of eczema would be entirely adequate for the diseases mentioned in the fine print. But the labeling does not so state. One of the remedial purposes of the food and drug legislation is to make self-medication safer. The requirements in Section 502(f)(1) of the Act (21 U.S.C. 352(f)(1)) are designed to effectuate this purpose and to prevent fraud and evasion.

2. It is also asserted that the allegations of the information do not comply with the settled legal requirement for such a pleading. Rule 42(b) of the Federal Rules of Criminal Procedure requires that contempt proceedings be prosecuted upon notice stating the essential facts constituting the criminal contempt charged and describing it as such. The information was designated "Information Re Contempt (Criminal)." It set forth the requirement of the injunction alleged to have been violated and the particulars of each violation. All of the violations were based upon the same charge—that the labels upon petitioners' product, as shipped, violated the decree because they did not contain direc-

tions for use in all of the conditions mentioned in the advertising. No objection to the information was raised at or prior to the trial. Most of the facts alleged were admitted. The sole defense of petitioners was that Colgrove had determined the meaning of the decree; that upon the basis of such determination he had acted in good faith; and that no violation had been intended. That petitioners were fully advised of the ultimate facts underlying the charges is conclusively shown by the defense interposed in the effort to meet them. In the light of all this, it is difficult to appreciate what further allegations the information should have contained in order that petitioners could interpose the defense which they interposed or any other defense. Certainly no substantial prejudice is shown by any alleged defect in the information. Cf. *United States* v. *Mine Workers,* 330 U. S. 258, 295-301.

3. Petitioners seek to attack the convictions upon the ground that "the existence of an independent statutory prerequisite to a conviction for criminal contempt" is not present (Pet. 18). Again, the premise for this contention is the erroneous assumption that this contempt proceeding was instituted under Section 21 of the Clayton Act, which provides for the punishment as contempt of any disobedience of an injunction where "the act or thing so done * * * be of such character as to constitute also a criminal offense" (28 U.S.C. (1946 ed.) 386). As we have shown at pages 12-13,

supra, Section 21 of the Clayton Act does not apply to a proceeding of this character, where the contempt consists of disobedience of a decree entered in a suit brought in the name of the United States. It is also argued that the Federal Food, Drug, and Cosmetic Act does not encompass advertising, and that petitioners have been found guilty of contempt on the basis of statements in their advertisements.

The District Court had jurisdiction of the parties and the subject matter. The injunction suit was instituted pursuant to the authority contained in Section 302 of the Act, *supra,* p. 2, providing that the district courts may enjoin violations of Section 301(a) thereof. The latter section prohibits the introduction into interstate commerce of a misbranded drug, and a violation of the section is made a criminal offense under Section 303 of the Act (21 U.S.C. 333). The District Court was required to determine in the injunction suit that the transactions complained of in that suit violated Section 301(a) before the injunction could be issued. The court determined that the introduction into interstate commerce of the petitioners' product "without a label containing specific directions for the use of such product in the treatment of all conditions, ills and diseases for which such product is prescribed, recommended, and suggested, in the advertising material disseminated or sponsored by or on behalf of the defendants" was a violation of the Act, and enjoined it. No appeal was taken

from the injunction decree. The decree thus determined the criminal character of the acts which it enjoined, and that a violation would be also a criminal offense under the Act. Petitioners having been convicted of disobeying the injunction, now seek to attack collaterally its validity and effect.

It is settled that alleged errors in an injunction "must be corrected by appeal and not by disobedience." *Clarke* v. *Federal Trade Commission,* 128 F. 2d 542, 543 (C.A. 9). In *United States* v. *Mine Workers,* 330 U. S. 258, 293, this Court said that even—

> an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued.

Nevertheless, it should be pointed out in answer to these contentions of petitioners that the violations of the injunction were of such character as to constitute also criminal offenses under the Federal Food, Drug, and Cosmetic Act, so that even if Section 21 of the Clayton Act were applicable, the condition referred to above was satisfied.

It is clear that in enacting the various subsections comprising Section 502 of the Act (21 U.S.C. 352), Congress sought to develop reasonable and effective safeguards for the public in its use of drugs. The

statute is affirmative in its demand that the labeling of a drug bear adequate directions for use, supplying the consumer with information essential to intelligent lay use. It is difficult to conceive of any information which could be more essential to the consumer regarding a drug which he can purchase without a physician's prescription than a statement or enumeration of the disease conditions for which the drug is to be used. Indeed, without such statement or enumeration no directions for the use of such a drug can be considered adequate under the Act. The statutory words "adequate directions for use" cannot be construed *in vacuo,* but must be considered in relation to the information they convey to the lay public and to the efficient administration of the statute. Labeling not only serves to inform the ultimate consumer, but it also performs the vital function of providing a means of determining compliance with, or violation of, the Act. Unless the statutory requirement of adequate directions for use in the labeling is a futility, the directions in the labeling must refer to the use of the drug in specifically enumerated conditions of disease and must lead to the effective use of the drug in the treatment or cure of such specified conditions. Furthermore, where a drug is offered to the public in newspaper advertising for certain disease conditions, it is no imposition upon the legitimate manufacturer to require him to state all of those conditions in the labeling, together with directions ade-

quate for its use in those conditions. The purport of the District Court's interpretation of Section 502(f) (1) of the Act, *supra*, p. 3, and its application to petitioners' methods has received judicial approval in other cases. *United States* v. *150 Packages, etc., Labeled in Part Bush Mulso Tablets, et al.*, 83 F. Supp. 875 (E.D. Mo.); *United States* v. *Various Quantities of "Instant Alberty Food," etc.*, 83 F. Supp. 882 (D.C.).

The undisputed evidence shows, with respect to each violation of the decree of which petitioners were found guilty, that the drug was misbranded because the labeling failed to bear directions for use in the treatment of the ailments which were named in the testimonial part of the advertising. The evidence to support the charges of contempt established violations of Section 301(a), *supra*, p. 2. Since findings were waived (R. 25), there was no requirement that the District Court make a special finding that the acts charged constituted criminal offenses under the Act. As to the asserted power to control advertising, it is obvious from a mere reading of the injunction that it in no way regulates petitioners' advertising. Under the terms of the injunction, petitioners can say whatever they wish in their advertising. The injunction merely requires the label of the product to enumerate all of the disease conditions for which the product is offered in the advertising with adequate directions for use in each of such conditions.

CONCLUSION

The decision below is correct and there is no conflict. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
VINCENT A. KLEINFELD,
JOHN T. GRIGSBY,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 457.

CHESTER WALKER COLGROVE and COLUSA REMEDY COMPANY (a Corporation), *Petitioners*,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

THURMAN ARNOLD,
Arnold, Fortas & Porter,
1200 Eighteenth Street, N.W.,
Washington, D. C.

WALTER M. GLEASON,
Merchants Exchange Building,
San Francisco 4, California,
Attorneys for Petitioners.

Dated: December, 1949.

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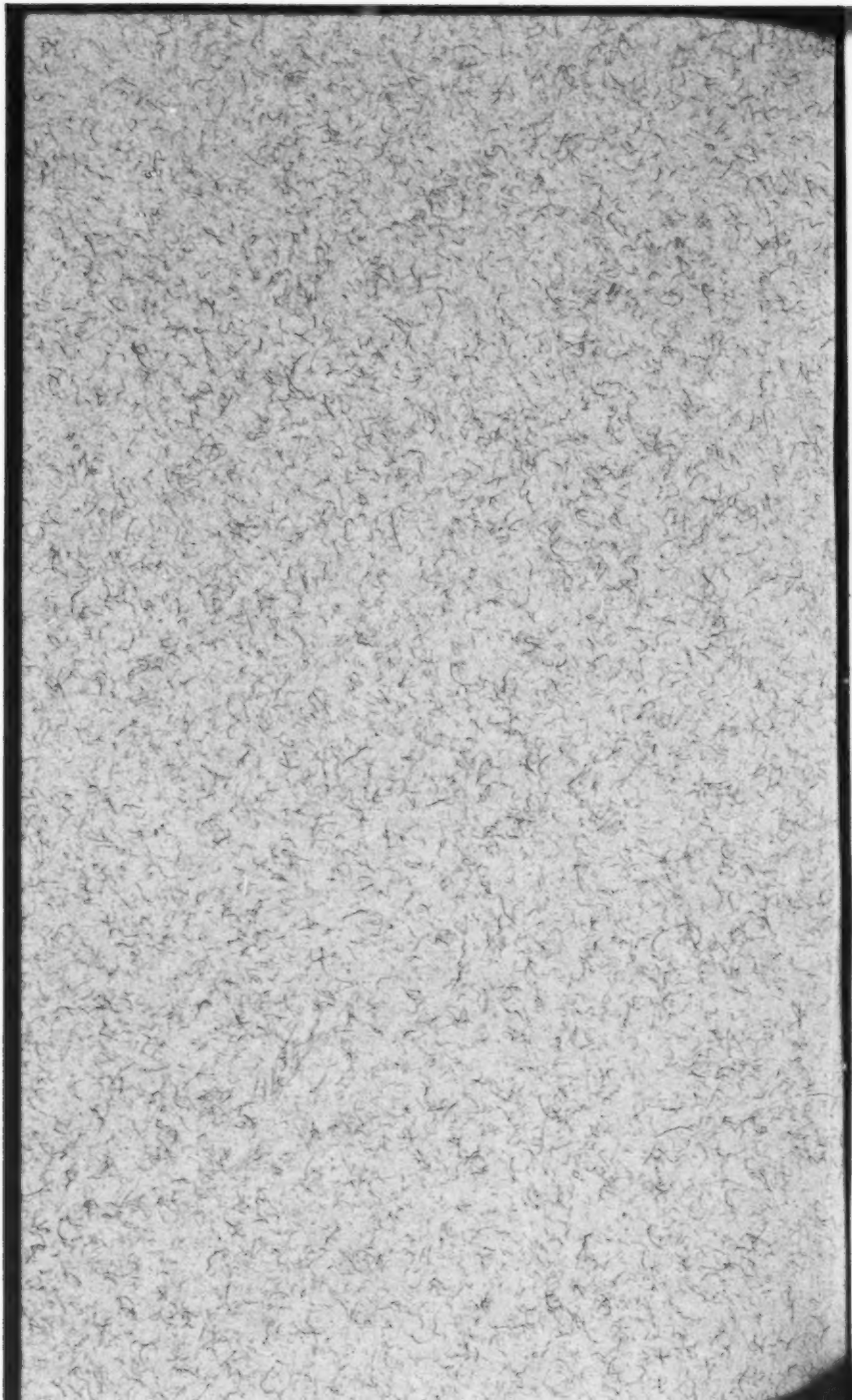

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The Government's brief in opposition clarifies the issue in this case. It flatly takes the position that punishment by jail sentence for criminal contempt of an injunction under the Food and Drug Act does not require any showing that the violation was intentional or wilful. The rule which the Government seeks to sustain is stated on page 11 of its brief as follows:

> "Colgrove did that which he deliberately intended to do. He relied upon his own judgment as to the scope of the decree and assumed a calculated risk that the advertisements would not constitute a violation. *In making his private determination as to the scope and*

> *effect of the injunction, he acted at his peril.* It is a well-recognized rule of criminal law that every man is presumed to intend the legitimate consequences of his own act. *Wrongful* acts knowingly or intentionally committed can neither be justified nor excused *on the ground of innocent intent.*" [Emphasis supplied]

The Government does not cite a single case where a person was ever punished for criminal contempt without pleading and proof of wilfulness. Its citations are exclusively cases of civil contempt.[1] The position which it takes as pointed out on pages 13 and 14 of our petition is directly contrary to the position of this Court in *Wilson* v. *State of North Carolina,* 169 U. S. 586, and of the Seventh Circuit in *United States ex rel. Porter* v. *Kroger Grocery & Baking Co.,* 163 F. 2d 168 (C.C.A. 7, 1947).

It is also contrary to the principles expressed in *Michaelson* v. *U. S.,* 266 U. S. 42, 66, and *Gompers* v. *Buck's Stove & Range Company,* 221 U. S. 418. In both of these cases criminal contempt is treated as a crime requiring for its proof all of the elements of a crime beyond a reasonable doubt. The crime here, of course, can only be defiance of the court. It is impossible for anyone to act in defiance of the court without a deliberate intention to do so. This means the court order must be knowingly flouted by the defendant in order to make a criminal case.

The Government's statement (Br. p. 13) "that the good faith or intent of the defendant may serve only in mitigation of the penalty and not as a defense" might apply if the defendant here had knowingly flouted the order. In such a case belief on the part of the defendant that he was justified in disobeying the court could only go to mitigation. But here there is not a scintilla of evidence that the defendant knew he was disobeying the court. And so the Government is driven to the extreme position that con-

[1] The only possible exception is a Tennessee District Court case involving a labor injunction. *U. S.* v. *Sanders,* 290 Fed. 428 (W. D. Tenn., 1923) where it is difficult to determine whether the court thought it was dealing with civil or criminal contempt.

scious disobedience is not required in criminal contempt on the theory that the defendant acted at his peril in construing the injunction. Such a definition of the offense of criminal contempt expands the contempt power of the federal courts beyond any case that has been heretofore decided. It is urged here by the Government without any supporting precedent whatever.

The Government, perhaps realizing the novelty and injustice of the rule it attempts to support, inserts in its brief a few statements to give the impression that the defendant knew he was disobeying the court. For example, on page 5 of its brief we find the following which is typical:

> "In 1945 petitioners resorted to the scheme of failing to mention in the labeling of the oil any of the ailments or diseases for which it was prescribed or recommended (R. 23, 89-90)."

The record reference is not to the testimony but to the portion of the opinion of the Court of Appeals referring to other cases in which the defendant was involved which are not before us here. There is no support whatever for any of the statements in the Government's brief inferring deliberate disobedience of the court. The only "scheme" of the defendant was an attempt to stay in business and comply with the law. This is corroborated by the fact that the Government does not suggest any conceivable advantage to the defendant in interpreting the injunction the way he did. Had he followed the interpretation which the court later put upon it, the difference in the advertisement or the label would have been so small as to have escaped notice. Certainly in order to spell out a deliberate scheme of disobedience by inference some rational purpose for the disobedience must be shown.

THE APPLICABLE SECTION.

The Government claims that the information was brought under Section 385 of 28 U. S. C. This is not correct. As the information itself states, the information was

brought under Sections 332(b) of 21 U. S. C. and 387 of 28 U. S. C. (R. 2). Section 332(b) of 21 U. S. C. is the applicable section of the Food and Drug Act. Section 387 of 28 U. S. C. outlines the procedure to be followed. Petitioners concede that Section 386 of 28 U. S. C. relied on in their petition is not directly applicable. But this makes no difference in the result. The reason that Section 386 is not applicable is because Section 389 exempts from its scope suits in the name of or on behalf of the United States. But in making that exemption Section 389 specifically provides that suits in the name of the United States "and all other cases of contempt not specifically embraced within Section 386 of this title, may be punished in conformity to the usages at law and in equity prevailing on October 15, 1914." These usages as shown by the cases which we cite require wilful disobedience of an order to justify criminal punishment for contempt. It is unthinkable that the rule could be otherwise.

Section 385, which the Government now claims is the applicable section instead of the section cited in the information, is simply a general grant of jurisdiction of federal courts to punish by fine or imprisonment contempts of their authority. The section severely limits that power restricting it to misbehavior in the presence of the court, misbehavior of officers of the court in their official transactions and disobedience or resistance to the commands of the court. It does not, as the Government seems to think, change the definition of criminal disobedience by eliminating the requirement of deliberate intention to disobey.

THURMAN ARNOLD,
Arnold, Fortas & Porter,
1200 Eighteenth Street, N.W.,
Washington, D. C.

WALTER M. GLEASON,
Merchants Exchange Building,
San Francisco 4, California,
Attorneys for Petitioners.

Dated: December, 1949.